IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHIN HING, *Appellant,* vs. HENRY M. WHITE, as Commissioner of Immigration at the Port of Seattle Washington, for the United States Government, *Appellee.*	No. 2651

In the Matter of the Application of CHIN HING, for a Writ of Habeas Corpus.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

Brief of Appellant

JOHN J. SULLIVAN,
Attorney for Appellant.

510-11 White Bldg., Seattle, Wash.

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STATEMENT OF THE CASE.

Appellant, Chin, Hing, a Chinese person, seeks admission to the United States as a minor son of a

merchant, Chin Shew. He was denied admission after a hearing by the appellee, Commissioner of Immigration at Seattle, Washington (Record p. 94). An appeal from the order of rejection was taken to the Secretary of Commerce and Labor of the United States at Washington, D. C., (Record p. 95), and after consideration the appeal was dismissed and the order of rejection affirmed by J. B. Densmore, the solicitor of the Department of Labor, assuming authority as Acting Secretary (Record pages 96 and 100). While being detained at Seattle, Washington, his port of entry, awaiting deportation, the appellant filed a petition in the United States District Court, for the Western District of Washington, Northern Division, praying for a writ of habeas corpus (Record pages 2 and 15), alleging in substance that he arrived at the port of Seattle on the 5th day of August, 1914, and applied for admission; that he was given a hearing and examined before the Immigration officers on the 27th day of August, 1914; an order was issued by the Commissioner of Immigration, at Seattle, Washington, denying admission, and ordering his deportation; that an appeal was prosecuted to the Secretary of Labor, and on September 26th, 1914, the

order of deportation was affirmed by one, J. B. Densmore, the solicitor of the Department of Labor, and not by the Secretary of Labor, or the Assistant Secretary of Labor, each of whom at the time of the determination of said appeal, was at his respective office in the City of Washington, and that the determination of this appeal by another, not authorized, is not a fair hearing, and does not accord to him due process of law.

II.

Petitioner further stated that he had not had a fair and impartial trial before the Inspector in charge of Immigration at Seattle, Washington; that there is no evidence in the records to sustain the Department's Exclusion and Deportation Order; that he was not allowed to have his counsel appear before the Commissioner General of Immigration, or the lawful Acting Secretary of Labor after said petitioner, Chin Hing, had appealed from said illegal act of said solicitor, J. B. Densmore, or after said appeal had reached the Department of Labor, in order that said counsel might present the case to the said Commissioner-General of Immigration, or the lawful Acting Secretary of Labor, and bring

to the attention of said officials the said illegal act of said solicitor, J. B. Densmore, and place certain evidence before said officials which would warrant a reversal of said Order of Exclusion and Deportation, or would warrant their consideration of the appeal of the petitioner.

III.

Petitioner further stated that he had not been accorded the rights or privileges allowed by the Constitution of the United States, and by the treaty between the United States and China, and prayed that he be discharged.

IV.

The writ was issued and return made by the Commissioner of Immigration, denying that appellant was not given a fair trial, or deprived of any of his rights, and petitioner affirmatively stating, among other things, that said appellant had his appeal considered by the Secretary of the Department of Labor, in the manner provided by law; that the record and decision and exhibits, both on the hearing before the said Commissioner, and on appeal

to the Secretary, was thereto attached and marked "Exhibit A," and made a part of said return, and praying that he be remanded (Record page 12). Upon the return day it was stipulated between counsel for the Government and counsel for the appellant that the depositions of Louis F. Post, Assistant Secretary of the Department of Labor, and Corry M. Stadden, both of Washington, D. C., should be taken before Thomas D. Lewis, Notary Public of Washington, D. C. who was appointed by the honorable court to take the depositions of the witnesses named. The witness, Louis F. Post, the Assistant Secretary, declined to testify, because his answer might be prejudicial to the public interest; and a rule was issued by Justice Gould, of the Supreme Court of the District of Columbia, returnable November 14th, 1914, directed to Louis F. Post, Assistant Secretary of Labor, requiring him to show cause why he should not answer certain questions propounded to him pursuant to said commission and stipulation (Record page 27). Whereupon the said Honorable Justice Gould, upon the matter coming up for hearing, after considerable delay, due to the solicitation of the Government, to postpone the hearing from time to time, rend-

ered a decision requiring said Louis F. Post to answer (Record page 31).

On the 5th day of April, 1915, a petition was filed by the Assistant United States Attorney requesting that the order entered pursuant to the stipulation of the 20th day of October, 1914, for the taking of the testimony of Louis F. Post, Assistant Secretary of Labor, he recalled, for the reason that on the 13th day of November, 1914, the Secretary of Labor had personally reviewed the record and affirmed the decision of the Commissioner of Immigration (Record page 32). Therefore, the court did, on the 11th day of May, 1915, render an opinion, recalling the Commissioner to take the depositions. The writ was discharged and the petitioner was remanded to the custody of the Department of Immigration (Record page 43), and an Order was so issued (Record page 44). To the entry of the above Order the petitioner excepted, which exception was allowed.

From this Order this appeal is taken. The appellant is now at large on bail.

ASSIGNMENT OF ERRORS.

Thereafter Bill of Exceptions were allowed (Record, pages 106-112), and Assignment of Errors were filed (Record, pages 115-120), which will be considered under the following:

I.

I will not take up space in this brief to repeat the Bill of Exceptions and Assignment of Errors, as shown in the record, but will take up those that I deem important which cover the alleged error set out, and the others herein omitted.

First: That the court erred in granting the petition of the Government to withdraw commission to take interrogatories, after the same had been stipulated, and upon refusal of the said Louis F. Post to answer, and rule to show cause had been issued by Justice Gould, an order was entered by said Justice Gould commanding said Louis F. Post, to answer same, and upon said answer to said interrogatories depended the determination as to whether the petitioner har been ordered deported without authority, and the court should have allowed said matter to be determined as the issue had been made up (Assignment XIV, Record, p. 118).

Second: That the court erred in allowing a further return on the day of hearing by the Government, showing that the Secretary had examined the original record, when by the first return, the original record was alleged to be before the court, and no order had been issued by this court allowing same to be taken from the files of the court (Assignment XVI, Record, p. 119).

Third: That the court erred in withdrawing the commission to take interrogatories and allow an alleged finding of the Secretary of Commerce and Labor to be offered in evidence, after the said cause between the petitioner and the Government was at issue (Assignment XVII, Record, p. 119).

Fourth: That the court erred in not holding that by the record in the cause, the burden of proof was upon the Government to show that J. B. Densmore acted with authority, (Assignment XVIII, Record, p. 119).

Fifth: That the court erred in not finding that the petitioner should have had notice that the appeal would be heard by the Secretary of Commerce and Labor, after this case was before the court, and that permission should be given counsel to present a brief, or oral argument, or both before the said

Secretary; and that said alleged hearing under said circumstances without order of the court when this case was before the court and issues made up, was irregular, illegal and unfair, and the court should not have admitted the finding and return as made on the day of hearing, as shown by the record. Assignment XIX, Record, p. 119.)

Sixth: That the Court erred in refusing to rule as requested by counsel for petitioner, that the memorandum for the Acting Secretary, included in said record, was an irregular, improper, and illegal addition to the record made by the Commissioner General of Immigration, or under his authority, and was not evidence, was not given under oath as shown by the record, and should not have been made a part of the record, or admissible.

Seventh: That the court erred in ruling that the so-called record marked exhibit "A," conclusively proved that the petitioner had been accorded a fair hearing, both at the port of entry and on appeal, in accordance with the law and treaty between the United States and China, and rules and regulations governing the admission of Chinese, and that there was evidence to substantiate the findings of the Department.

ARGUMENT

It seems to me that when the writ of habeas corpus was issued, the issue was then raised before the Honorable Judge Neterer, and the only one which he should pass upon was the legality of the detention, under the alleged authority of J. B. Densmore, and the question as to whether or not the petitioner, Chin Hing, had been given a fair and impartial hearing before the Immigration authorities as disclosed by the record then before the court, on the issues made up. A question of fact was then presented upon said issue: Was the Assistant Secretary of Labor, or the Secretary of Labor, or either, present and on duty in the Department of Labor on the day said order of exclusion was signed by the said J. B. Densmore? There is a very clear and well defined distinction between the duties and responsibilities of a Public Ministerial Officer and of one who performs executive functions, as an agent of the President. It may be said of the Secretary of Labor or whoever acts in his stead as was said of the Secretary of State, who is charged with the conduct of secret correspondence with foreign nations, in the leading case of *Marbury vs. Madison*, 1 Cranch, 137, 138:

> "His duties are of two kinds and he exercises his functions in *two distinct capacities* as a *public ministerial officer* of the United States, and as an *agent of the President.* In the *first his duty is to the United States, or its citizens;* in the other his duty is to the President; in the one he is an *independent* and an *accountable* officer; in the other he is dependant on the President, is his agent and is accountable to him alone. In the former he is *compellable* by mandamus to do his duty; in the latter he is not."

This distinction is clearly pointed out in the Acts of Congress creating the Department of Labor and restricting Chinese Immigration, or immigration in general. In the Act of March 4, 1913, creating the Department of Labor (37 U. S. Stat. at Large, Chap. 141), the Secretary of Labor is charged with certain executive duties, as making "such special investigations and reports as he may be required to do by the President," around which the veil of secrecy and of privilege may be thrown; and also with other ministerial duties as to making "investigations and reports" as may be required "by Congress" as to which here is no secrecy, or privilege unless Congress shall by specific act so provide. Section 2, in part provides as follows:

> "That there shall be in said department an Assistant Secretary of Labor, to be appointed by the President, who shall receive a salary of five thousand dollars a year. He shall perform such duties as shall be prescribed by the Secretary or *required by law.*"

The Assistant Secretary, therefore, performs both executive and ministerial duties. And by virtue of Section 177 of the Revised Statutes, of the U. S., which says:

> "In the case of the death, resignation, absence or sickness of the head of any department, the *first* or *sole assistant* thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease."

he becomes the head of the Department in the absence of the Secretary of Labor. The Assistant Secretary of Labor, therefore as such acts in a subordinate capacity; but in the absence of the Secretary he at once, and automatically, assumes all of the duties and responsibilities of the head of the Department, which none other, unless otherwise authorized by the President according to law,

can exercise or assume, in whole or in part, during said absence.

By the Acts of February 14, 1903, (32 Stat. p. 828), and of March 4, 1914 (37 Stat. c. 141), the authority and power with respect to the enforcement of the Chinese exclusion laws, theretofore vested in the Secretary of the Treasury, have been transferred to the Secretary of Labor. By Section 8, of the Act of September 13, 1888 (25 Stat. 476), known as the "Exclusion" law, he is authorized and empowered to make or amend regulations to secure to the Chinese the rights provided for in subsisting treaties between the United States and China. This authorityalso appears in the Act of April 29, 1902, as amended by Sec. 5, of the Deficiency Act, of April 27, 1904 (32 Stat. part 1, p. 176; 33 Stat., pp. 394-428).

Section 25, of the Immigration Act of February 20, 1907 (34 Stat., part 1, pp. 898, 906), provides in part as follows:

> "Provided, that in every case where an alien is excluded from admission into the United States, under *any* law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final unless reversed

on APPEAL TO THE SECRETARY OF COMMERCE AND LABOR."

Under Rule 5, of the "Regulations Governing Admission of Chinese," the Chinese applicant if adjudged to be inadmissible "shall be advised of his right to appeal to the Secretary of Labor;" and (c) "The notice of appeal shall act as a stay upon the disposal of the applicant until a final decision is rendered by the Secretary of Labor."

The Secretary of Labor, therefore, cannot lawfully delegate any power or authority to the Solicitor of the Department of Justice, who is a lawyer detailed to duty in the Department of Labor. Only the President can delegate such power and authority, but not until the emergency arises, as is contemplated by Sections 177 (quoted in the foregoing) and 179, R. S., which is as follows:

> "Sec. 179. In any of the cases mentioned in the two preceding sections, except the death, resignation, absence or sickness of the Attorney General, the President may, in his discretion, authorize and direct the head of any other department, or any other officer, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is

> appointed, or the sickness or absence of the incumbent shall cease."

The President has provided, under Section 179, for such an emergency as the law contemplates, by an Executive Order, No. 1783, as follows:

> "Pursuant to the authority contained in Section 179, of the Revised Statutes, I hereby authorize and Direct John B. Densmore, Solicitor of the Department of Labor, to perform the duties of Secretary of Labor, during the absence of the Secretary of Labor and the Assistant Secretary of Labor." June 5, 1913.

There is no such officer as the President described, "Solicitor *of* the Department of Labor," but no point is made as to that in this proceeding.

If either the Secretary of Labor, or the Assistant Secretary of Labor was on duty at the time the Solicitor, Mr. Densmore, signed the order, the detention is *illegal.* In discharging the prisoners, *In re Tsuie Shee et al,* at San Francisco, October 23rd, 1914, Judge Dooling, of the United States District Court for the Northern District of California, said:

> "The appellants were by law entitled to appeal to the Secretary of Labor, and entitled to have their appeal heard and determined by

him except as above stated, and the determination of their appeal by *another not authorized,* is *neither a fair hearing, nor due process of* law."

As further stated by Honorable Judge M. T. Dooling, in the United States District Court, in re Quan Wy Chung, No. 15,687, filed October 23rd, 1914, as follows:

"Whoever, therefore, challenges his right to act must assume the burden of proving clearly that his action was not had in the 'absence of the Secretary and Assistant Secretary.' But, however, inconvenient it may be, if the Secretary and Assistant are not absent, and particularly if both are present, his performance of the duties of the Secretary is unauthorized, either by the statute, or the order of the President. In the case at bar, it is practically conceded, and conclusively established, that the appeal was not determined by the Acting Secretary in the absence of the Secretary and Assistant Secretary, but that, on the contrary both were present, and performing the duties of their office at the time the appeal was determined. The appellants were by law entitled to appeal to the Secretary of Labor, and entitled to have their appeal heard and determined by him, except as above stated, and the determination of their appeal by another, not authorized, was not a fair hearing, nor due process of law."

Therefore, when the Government in its return to the writ of habeas corpus, as shown in paragraph IV, Record page 14, stated that the said Secretary of the Department of Labor, after due consideration of said appeal, affirmed the decision of said Commissioner of Immigration in the manner provided by law, and the petitioner and appellant had said that the said J. B. Densmore was neither Secretary nor Assistant Secretary, then I contend that the Government must show that J. B. Densmore was Acting Secretary under Executive order, because of the absence of the Secretary and Assistant Secretary, and the petitioner having denied that the Secretary and Assistant Secretary were absent, the burden then is upon the Government to show that the Secretary and Assistant Secretary were absent when J. B. Densmore acted.

There is no presumption of law that the Secretary or Assistant Secretary were absent on September 26th, 1914, or that the solicitor, Mr. Densmore, was Acting Secretary. It is a question of fact to be proved by the one averring it. However, even if the court should hold that the burden of proof was upon the petitioner to prove that J. B. Densmore acted without authority, the stipulation to take

the depositions of Louis F. Post and Corry M. Stadden, of Washington, D. C., as shown by Record p. 26, would have determined the fact at issue before the court, as to the legality of the said J. B. Densmore's order confirming deportation. And Justice Gould having ruled pursuant to a rule to show cause, that said Louis F. Post should answer, as shown by Record p. 31, then it would seem that the Honorable Jeremiah Neterer erred in allowing the Government, on the 25th day of April, 1915, seven months after the petition for writ of habeas corpus had been filed, to make a return showing that the Secretary of the Department of Labor had passed on the record, which, by the original return, as shown by Record, p. 14, which was supposed to be before the court, and make an order recalling the depositions, which would have proven the legality or illegality of the act of the said J. B. Densmore, on the issue which had been made up at the time of the writ of habeas corpus was issued, seven months prior; it seems to me to usurp the dignity of the honorable court in which this petition was filed for a writ of habeas corpus, as well as the Supreme Court of the District of Columbia, in giving the right of an official of the Department to supersede an official of the court

in determining a case wherein the original record, upon which a finding should be made, was not before the Secretary, as the record shows, but before the Honorable Jeremiah Neterer, and who had issued no order giving the Secretary the right to remove the said records and therefore any finding was outside the record, outside the issues then made up, and should not have been allowed.

If this procedure is allowed to be followed then a writ of habeas corpus, which has become the strong arm of protection to one who is being deprived of any right under the Constitution, is of little avail, for if the law gives a man the right, even though he be an alien, to set up the illegality of an act in a petition for writ of habeas corpus, and the issue is made up on that fact, and the original record is before the Honorable Court, before whom that issue was made, then after the petitioner has been put to the expense of going into court and procuring counsel, the Immigration Department can then make little of the high dignity and authority and power of the court, and the strong protecting arm of the writ of habeas corpus, and make a finding upon an alleged true copy of the record, without even notifying the court, or alien, or his counsel, and

the court sanctions such procedure, then, to whom is an alien to look for protection?

UNFAIR HEARING

Taking up now the question as to the allegation of unfair hearing, I contend that there was no evidence upon which the Government, the Commissioner, Acting Secretary, Secretary, or any Chinese Inspector could make a finding:

First: That Chin Shew was not a merchant.

Second That Chin Hing, the applicant and appellant was not a minor son of said Chin Shew, a merchant of New York City, and that he should not be admitted.

The law has been well settled, as stated by this court, in many decisions, and by the Supreme Court, in the case

Chin Yow vs. U. S., 208 U. S. 8;
United States vs. Ju Toy, 198 U. S. 253;
Tang Tun vs.Edsel, 223 U. S., 673.

That the decision of the Department is final, but that is on the presupposition that the decision was

after hearing in good faith, however summary in form, and based upon evidence.

We, therefore, represent to this court that the record in this case comes within the purview of the rule of law laid down by this court, and by the Supreme Court in the cases decided, to-wit, that the action of the executive officers was such as to prevent fair investigation; that there was manifest abuse of the discretion committed to them by the statute; that the proceedings were manifestly unfair, showed the prejudice of the examining inspector, and that there was no evidence upon which to base such findings and order of deportation.

Take the first issue:

The status of the father: The record shows that Chin Shew was a bona fide member of the mercantile firm of Quong Wo Chong Company, doing business of buying and selling merchandise in the City of New York (Record pp. 58-60). The report of the Chinese Inspector in charge, Albert E. Wiley, of New York City, (as shown by Record pages 67 and 68), gives credit to the alleged father and the identifying witnesses and among other things states, as follows:

"THE STATUTORY WITNESSES ARE REPUTABLE BUSINESS MEN AND

HAVE GAINED THEIR KNOWLEDGE OF THE MERCANTILE STATUS OF CHIN SHEW THROUGH BUSINESS RELATIONS WITH HIM AS A MEMBER OF THE FIRM, AND I MIGHT ALSO STATE THAT CHIN SHEW IS KNOWN TO BE ACTIVELY ENGAGED IN THIS STORE.

"The alleged father, and witness, Fong Goon Moon testified in an unhesitating manner and impressed me that they were telling the truth. No material discrepancies appeared in their statements.

ALBERT E. WILEY,
Chinese Inspector."

Here is a letter showing personal knowledge of the inspector who saw the witness, interviewed them, and gives his personal opinion.

I wish also to impress upon this honorable court that the Government offered no testimony to rebut the evidence of the status of the father as a merchant, and the court understands that the Chinese Exclusion laws are to exclude Chinese laborers, and not those of the exempt classes, who by law, are admitted, upon proper proof being made.

The evidence of the issue of relationship consists of the statements of Chin Shew, and the Chinese

witness, as well as the statement of the applicant himself.

In the digest of the evidence made by the Commissioner at Washington, (Record pp. 48-51) on page 49 great stress is laid on the fact that there is discrepancy in the testimony of the applicant and his father is in respect to the paternal father; "the applicant having stated, in fact, that this relative is dead, and he had never seen him; and the alleged father having stated that his father died at his home in 1900, which would be within the memory of the applicant."

It seems to me that there is no ground for reaching this conclusion, that the boy is not the son of Chin Shew, because he cannot recollect, within his memory, the appearance of his father's father; that the said boy was of the tender age of five years, and I venture that the members of this court would have, if any recollection, only a hazy one, of the appearance of their paternal parents, if that impression was cut off at the age of five years.

It does not seem that the Immigration law was intended to give to the Immigration Department the power to separate children and parents, based upon such conclusions as we find in this case, as shown by

the record. I would like to ask this honorable court to read the examination of the applicant (Record pp. 60-67), the examination of Chin Shew, the father (Record pp. 69-80), the re-examination of the applicant (Record pp. 85-88), and Your Honors, I am certain, will then come to the conclusion that there is no evidence upon which to base the finding that the applicant was not the minor son of his father, Chin Shew, a merchant of New York City.

Taking up that the contention that the memorandum for the Acting Secretary, included in said Record, as shown by Report of Inspector Mangels to the Commissioner of Immigration (Record pp. 89-91), was an irregular, improper and illegal addition, and was not evidence, was not given under oath, as shown by the record, and should not have been made a part of the record; I will ask Your Honors to look on Record page 90 of said report, wherein the Inspector, without notice to applicant, without giving him a chance to examine said record, or be apprised of the fact that reference was being made to it to bear out the Department's contention that the applicant was not entitled to admission, sets up excerpts from a case therein, stated as the

Chin Quong case, and quotes from said case half a dozen times. The same inspector, in the examination of the applicant (pp. 87 and 88), instead of trying to bring out the testimony in a fair and impartial manner, tried to mix up his questions to the applicant in such a way as to catch him, and showed plainly his unfairness.

It seems to me that under the rule of fairness, even though the power be given to inspectors to summarily examine and decide on a case, that any rule of reason and fairness would require that any evidence upon which the Department would base a finding, be given under oath, and any record in any case, outside of the case then being passed upon, the applicant should be apprised of said record and given a chance, on his own behalf, to meet the allegations of the Department, as shown by the record which they examined, but which the applicant had no knowledge of.

AUTHORITIES

It was said in

U. S. vs. Quan Wah, (D. C.), 214 Fed. 462;

> "Nor can the fact that the burden of proof to show right to be in the United States is thrown upon the Chinaman necessitate his further showing that the action of the authorities who decided he had the right to enter was correct, unless the evidence shows that his entry was fraudulently obtained."

Immigration officers cannot act arbitrarily in refusing to believe persons sought to be deported, or his witnesses.

U. S. vs. Lee Chung, 206 Fed. 367;
In re Chin Wong Lee, 91 Fed. 240;
Wong Chung vs. U. S. 170 Fed. 182;
95 C. C. A., 198;
U. S. vs. Loung San, et al, 144 Fed. 72;
U. S. vs. Lee Huen, 118 Fed. 457.

It is not sufficient to raise a doubt.

U. S. vs. Hong Lin, 214 Fed. 456.

One cannot be deported on insufficient or illegal evidence, ex parte, *Yah Ucaina,* 199 Fed. 885.

In determining whether aliens are entitled to

admission, the immigration authorities act in an administrative and not a judicial capacity, and must follow definite standards. and apply general rules.

U. S. vs. Uhl, 203 Fed. 152.

Congress has seen fit to base the final decision as to the rights of aliens to enter the country in the Department of Commerce and Labor, but that Department is governed by certain rules and regulations, which must be *strictly construed* in conformity with the *eternal principles of justice and right.*

It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal.

U. S. vs. Redfern, 180 Fed. 500.

In the case of *U. S. vs. Williams,* 185, Fed., 598, 599, District Judge Holt, after stating the usual procedure in deportation proceedings, says:

> "It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the prosecution. He is held in seclusion and is

> not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge. The Secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceeding is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IS INVALID."

Where, by the abuse of the discretion or the arbitrary action of the inspector or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or about to be deported, the power is conferred, and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him.

> *Chin Yow vs. U. S.*, 208, page 8;
> *Low Wah Suey vs. Backus*, 225 U. S., 460

That is not a fair hearing in which the inspector chooses or controls the witnesses or prevents the

accused from procuring witnesses or evidence or counsel he desires.

U. S. vs. Sibray, C. C., 178 Fed. 144;
U. S. vs. Williams, D. C., 185 Fed. 598;
Roux vs. Commissioner of Immigration, 203 Fed. 413;
212 C. C. A. 523.

The law is now well settled that no alien can be deported upon mere suspicion, rumors, "repute," information and belief, hearsay statements, reports and letters of a secret nature, not sworn to and without the benefit of cross-examination.

In the case of *Hanges vs. Whitfield,* 209 Fed. 675, it was held, after calling attention to the Immigration rules of November 15, 1911, especially rule 22, and the subdivisions thereof, which prescribe the procedure to be followed in deportation hearings:

> "Testimony may, no doubt, be taken in the form of affidavits, or otherwise, preliminary to, and as a basis for, an application for warrants of arrest of specified aliens when the Immigration officers are credibly informed, or have good reasons to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible

against the aliens upon the hearing required to be given them after warrants for their arrest have been issued, to determine whether or not they shall be deported? * * * It is incumbent upon the Government to establish by *competent evidence* that the petitioners or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the Government; but it must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported."

Further the court says:

"True, the petitioners and their counsel were permitted to examine the record, or copy of the testimony taken by the inspector prior to the application for the warrant of arrest; but of what avail was that? That testimony had already been forwarded to the Bureau of Im-

migration, and an inspection of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthfulness by legitimate cross-examination or otherwise. That such testimony is legally admissible in any proceeding in which it is sought to deprive any person, citizen or alien, of his personal or property rights, cannot be successfully maintained."

This important decision was recently affirmed by the Circuit Court of Appeals for the Eighth Circuit (*March* 22, 1915), 222 Fed. 745. The Circuit Court of Appeals delivered a most instructive opinion. The court, among other things, said:

> "A full and fair hearing on the charges which threaten his deportation and an absence of all abuse of discretion and arbitrary action by the inspector, or other executive officer, are indispensable to the lawful deportation of an alien. Where, by the abuse of the discretion or the arbitrary action of the inspector, or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him."

The Japanese Immigration Case, 189 U. S. 86, 100, 101, 23 Sup. Ct. 611, 47 L. Ed. 721;

Chin Yow vs. U. S., 208 U. S., 8, 10, 12, 13, 28 Sup. St., 201, 52 L. Ed., 369;

Low Wah Suey vs. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165;

Ex parte Petkos, (D. C.), 212 Fed. 275;

U. S. vs. Chin Len, 187 Fed. 544, C. C. A. 310.

Again, the same learned court states:

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence AT THE HEARING, AND THAT ONLY; AND THAT THE DECISION SHALL NOT BE WITHOUT SUBSTANTIAL EVIDENCE TAKEN AT THE HEARING TO SUPPORT IT."

In re Rosser, 101 Fed. 562, 567, 41 C. C. A. 497;

In re Wood & Henderson, 210 U. S. 246, 254, 28 Sup. Ct. 621, 52 L. Ed., 1046;

Interstate Commerce Commission vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 91-93, 33 Sup. Ct. 185, 57 L. Ed., 431;

Ex parte Patkos (D. C.), 212 Fed. 275-278;

U. S. vs. Sibray (C. C.), 178 Fed. 144, 149.

Continuing, the Circuit Court of Appeals says (page 754):

> "That was not a fair hearing in which the inspector after the hearing imported into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearings."

Interstate Commerce Co. vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 93, 33 Sup. Ct. 185, 57 L. Ed. 431;

Ex parte Petkos (D. C.), 212 Fed. 275, 277, 278.

That an alien cannot be deported on mere suspicion or anything not amounting to substantial and competent evidence is also announced in another deportation case, that of *Ex parte Lam Pui,* 217 Fed. Rep. 456. In an able opinion, District Judge Connor, said:

> "Test-writers and judges have undertaken to define the word 'evidence,' as applicable to

judicial investigation, with more or less success. Probably no more satisfactory definition is found for practical purposes, than that given by Mr. Edward Livingstone:

" 'Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.'

"It is elementary that in judicial proceeding the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. IT IS ALSO ELEMENTARY THAT MERE SUSPICION, CONJECTURE, SPECULATION, IS NOT EVIDENCE, NEITHER CAN IT BE MADE THE BASIS FOR FINDING A FACT IN ISSUE. The industry of counsel affords a number of illustrative expressions of courts. In *People vs. Van Zile,* 143 N. Y. 372, 36 N. E. 381, Andrews, Chief Justice, says:

" 'Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'

"Judge Caldwell, in *Boyd vs. Glucklich,* 116 Fed. 131, 53 C. C. A. 451, well says:

" 'The sea of suspicion has no shore, and

the court that embarks upon it is without rudder or compass.'

"It may be that, upon a full, fair hearing, in which petitioner has the benefit of counsel, and all of his rights secured to him, the government will be able to establish the charge made against him. I am of the opinion that such a hearing has not been had, and that no evidence has been adduced upon which the finding that petitioner procured his certificate by false and fraudulent representations can be sustained. These are the only questions presented upon this record.

"The petitioner is entitled to be discharged from custody. An order to that effect will be drawn."

See also

Jonras vs. Allen, 223 Fed. 756;

Ex parte Ong King Sing, 213 Fed. 119.

In the case of *Ex parte Lam Fuk Tak*, 217 Fed. 468, *469*, the Federal Court there said of a report by an Immigration Inspector inserted in the record and used against the alien.

"At this point the inspector puts in a record. 'On the occasion of the visit to that laundry by the inspector in charge, on or about December

20, 1913, this Chinaman was found engaged in laundry work there—126 Market Street.'

"Except for the statement inserted in the record, *not under oath,* and doubtless without the knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. *It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.*

THE STATEMENT OF THE INSPECTOR MUST BE STRICKEN OUT AND DISREGARDED. THE FACT THAT IT IS INSERTED IN THE RECORD TENDS STRONGLY TO SHOW THAT PETITIONER WAS NOT GIVEN A FAIR HEARING. ELIMINATING THIS STATEMENT, THERE IS NO EVIDENCE UPON WHICH THE ORDER FOR DEPORTATION CAN BE SUSTAINED. LET THE PETITIONER BE DISCHARGED."

As was stated by Judge Morton, 223 Fed. 833:

"The proceedings plainly were not of a judicial character. They cannot be supported, it seems to me, as legitimate administrative proceedings, because the officers did not endeavor themselves to ascertain the truth about the matter. *Teng Yun vs. Edsel,* supra; *U. S. vs. Sprung,* 187 Fed. 903, 907, 110, C. C. A. 37, *Bouve on Aliens,* p. 518. They believed that this petitioner was endeavoring to enter the United States fraudulently. They, therefore, instituted proceedings against him, endeavoring by every legal means in their power to procure his deportation. They did not act in bad faith; I do not doubt that they honestly believed the prisoner to be unlawfully here. I think, however, that the IMMIGRATION RECORDS SHOW THAT THEY WERE ENDEAVORING TO MAKE OUT A CASE, RATHER THAN TO ACT IN A FAIR OR JUDICIAL MANNER TOWARD THE ALIEN. I see no other explanation of their refusal to allow him the assistance of counsel, their omission to notify his counsel of the taking of testimony in Pennsylvania, their uncritical acceptance and use of the testimony of Hop Lee, taken in proceedings to which this prisoner was not a party. * * * These seem to me to be vital questions in considering the fairness of the proceedings; and no answers to them have been suggested by the respondent, except that the officers were not legally obliged to do more than they did, *which*

is the attitude of a prosecutor, rather than of a judge, or of a fair administrative officer, in a case like the present.

"It does not seem to me that the opportunity here given to present evidence and to argue the case rendered the proceedings fair, or in accordance with due process of law. They are to be viewed as a whole, and, so viewed, they present, to my mind, a plain violation of the fundamental principles of fair play by the Immigration Inspectors. I find and rule that the proceedings before them were substantially—and on account of their mistaken attitude towards the matter I think intentionally—unfair to the alien. The Acting Secretary, instead of disaffirming the illegal conduct of his subordinates, approved it and based his decision on it. In this case the petitioner belongs to a race little favored by our law. But it has been held that Immigration tribunals have authority to determine finally, with no appeal to the law courts or to a jury, questions of citizenship; and the next case of this character may be one of an American citizen endeavoring to protect himself against exile by administrative order made in this way. *U. S. vs. Ju Toy,* 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed., 1040; *Tang Tun Case*, supra.

"Without considering the other points urged on behalf of the petitioner, I am of opinion that he had not a fair hearing before the Immigration authorities."

I have gone into this case at great length in trying to impress upon this Honorable Court the fact that while the record shows that one of the administrative officers, Inspector Wiley, of New York City, intended to give the applicant a fair hearing, the others did not, and, as stated in one of the cases above cited, SEEMED ANXIOUS TO MAKE OUT A CASE TO CAUSE DEPORTATION, INSTEAD OF ENDEAVORING TO EXTRACT THE TRUTH.

This Honorable Court, with the power granted to it, should not, by its decision, refuse to look into such abuse of discretion, but should on the other hand, rebuke the high handed methods employed by some of the inspectors throughout this country, as shown in this case.

Would it not be more consistent for this Honorable Court to apply the Golden Rule in this case, and by its decision say to the Immigration Department, and to those acting under the authority of the Secretary of Labor: "It is true that you have been given by Congress, power to summarily pass upon the admission of an alien Chinaman, but 'he is a man for a' that,' a human being, and your procedure must be orderly and consistent with the sub-

stantial justice, regardful of the rights of an alien, and your action of deportation, when same is given, must be founded on facts, on evidence, not mere whim or suspicion." And thus will this court, by its act of justice, lay a foundation for future dealings between the great nations of China and America, which will redound to the benefit of the people of these two great Republics; for it is to America that China looks as a guiding star to that high plane of development and civilization to which this country has attained.

Respectfully submitted,

JOHN J. SULLIVAN,
Attorney for Appellant.

510-11 White Bldg., Seattle, Wash.

ADDITIONAL AUTHORITIES:

Low Kwai v. Backus, C.C.A. No.2522
decided Feb. 14, 1916;
Gegiow et al. v. U. S. A.,
No. 340, Supreme Court U. S.,
decided Oct. 25, 1915.